

In the Matter of Nicolas Castillo

CSC Docket No. 2011-753

OAL Docket No. CSR 9396-10

(Civil Service Commission, decided July 13, 2011)

The appeal of Nicolas Castillo,¹ a Sheriff's Officer Bilingual in Spanish and English with Monmouth County, of his removal, effective May 24, 2010, on charges, was heard by Administrative Law Judge Joseph Lavery (ALJ), who rendered his initial decision on May 31, 2011. Exceptions were filed on behalf of the appellant and cross exceptions were filed on behalf of the appointing authority.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on July 13, 2011, accepted and adopted the Findings of Fact and Conclusion as contained in the initial decision and the recommendation that the removal be upheld.

DISCUSSION

The appellant was charged with conduct unbecoming a public employee, discrimination that affects equal employment opportunity, other sufficient cause and violation of departmental rules and regulations.² Specifically, the appointing authority asserted that on April 27, 2010, the appellant, while on duty and in uniform, gave a note to Sandra Miller, a county employee, that contained sexually explicit and suggestive language. Upon the appellant's timely appeal to the Commission, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In his initial decision, the ALJ found that Ms. Miller accepted a note from the appellant on April 23, 2010 and freely accepted a second note on April 27, 2010. After discussing the April 27 note with two co-workers, Toni Friedhoff and Barbara Barbolini, she was uncertain as to whether to report the matter. However, after a discussion with a third co-worker, Phyllis Stanley, Ms. Miller felt compelled to inform her superiors of the incident. The ALJ also found that the appellant's intent was to begin a dating relationship with Ms. Miller. While testimony from the three co-workers was offered at the hearing, Ms. Miller was unavailable to present in-person testimony. As such, there was no sworn testimony indicating that Ms.

¹ The spelling of the appellant's first name in the initial decision is incorrect.

² Violation of Sheriff's Officer rules and regulations: Professional Conduct and Responsibilities (4.1.1); General Conduct on Duty (4.2.1); Public Activities (4.10.3); General Order 97-20 (Mission and Values); and General Order 98-22 (Anti-Harassment and Discrimination). Violation of Monmouth County Policy 703 regarding Sexual and Other Unlawful Harassment; Monmouth County Policy 701 regarding Employee Conduct and Work Rules; and Monmouth County Policy regarding Prohibiting Workplace Discrimination and Harassment.

Miller thought herself sexually harassed or offended by the April 27 note. However, the ALJ noted that as a matter of law, neither Ms. Miller's state of mind nor the appellant's intent were determinative in the instant matter. In this regard, the ALJ referred to *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587 (1993), and determined that a reasonable woman would consider the April 27 note as sexual harassment. The ALJ emphasized that the appellant's testimony that this note was not sexually suggestive and did not evidence bad judgment demonstrated extraordinary ignorance regarding the responsibilities of a Sheriff's Officer, as well as the general expectations of respectful gender interaction. Thus, the ALJ concluded that the appointing authority demonstrated by a preponderance of the evidence that the appellant's conduct was in violation of the relevant Sheriff's Office and Monmouth County rules.

With respect to the penalty, the ALJ determined that the appellant's act of presenting an exceptionally graphic note while on duty to a woman whom he barely knew immediately brought him within reach of a stringent standard governing the application of discipline since as a law enforcement officer, he is held to a higher standard. As such, the ALJ found that removal was the appropriate penalty.

In his exceptions, the appellant contends that the ALJ erroneously refused his discovery requests to support his claim of discriminatory and disparate treatment by the County.³ The appellant argues that the Monmouth County Policy regarding Prohibiting Workplace Discrimination and Harassment specifies that harassment is *unwelcome* conduct. Since the ALJ determined that the appointing authority failed to establish that the April 27 note was unwelcome or that it was intended to harass, the ALJ erred in concluding that the appellant's conduct constituted harassment. The appellant emphasizes that the April 27 note was a private attempt to initiate a dating relationship and dating between county employees is a common practice. He also argues that Ms. Miller's refusal to attend the hearing in this matter deprived him of his Constitutional right to cross examine his accuser. Additionally, the appellant asserts that the ALJ violated the principle of progressive discipline by failing to consider his lack of prior discipline. Finally, the appellant concludes that the penalty of removal is arbitrary and unjust given that he did not violate any County or State policy by passing a private note to another adult who willingly accepted what she knew was a request for a dating relationship.

In response, the appointing authority contends that the ALJ appropriately rejected the appellant's request to obtain discovery into unrelated disciplinary matters involving non-parties. The appointing authority argues that the appellant's purported reason for the note, *i.e.*, to establish a dating relationship, does not allow him to escape liability under the County's sexual harassment policy. Furthermore,

³ The appellant, who is of Latino heritage, maintains that a Caucasian officer accused of the same misconduct only received an eight-day suspension.

it contends that the *Lehmann* standard has been met. The appointing authority presents that Ms. Miller's unavailability did not deprive the appellant of his right to a fair hearing or due process. Finally, the appointing authority maintains that removal is the appropriate penalty in this matter.

Upon its *de novo* review of the record, the Commission finds the appellant's arguments unpersuasive. As correctly noted by the ALJ, the appellant's intent and Ms. Miller's state of mind are irrelevant in determining whether the appellant's conduct constituted harassment. *See Lehmann, supra*. The appellant's conduct in this matter is not disputed: the appellant, while on duty as a Sheriff's Officer, gave a sexually graphic note to a woman whom he barely knew. A reasonable woman would clearly regard the note as sexual harassment. In this regard, Ms. Miller's failure to testify is not relevant or necessary to establish the admitted conduct of the appellant.

Furthermore, in determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *See West New York v. Bock*, 38 N.J. 500 (1962). However, it is well established that when the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 N.J. 474 (2007). In the instant matter, the Commission emphasizes that a Sheriff's Officer is a law enforcement employee who must enforce and promote adherence to the law. *See Moorestown v. Armstrong*, 89 N.J. Super. 560 (App. Div. 1965), *cert. denied*, 47 N.J. 80 (1966). *See also, In re Phillips*, 117 N.J. 567 (1990). Clearly, in this case, the appellant's actions were outside the bounds of acceptable workplace behavior, especially for a law enforcement employee. The Commission finds the appellant's seemingly cavalier attitude toward using, while on duty as a law enforcement officer, such sexually explicit language with a relatively unknown woman particularly troubling. Moreover, the Commission rejects the appellant's contention regarding alleged disparate or discriminatory treatment. Initially, it is clear that the appellant's conduct was abhorrent and worthy of severe sanction. Further, the Commission, independent of the appointing authority, determines the ultimate penalty in these matters. The fact that the appointing authority may have imposed a different penalty for a similar matter not presented to the Commission does not persuade it that the appellant's conduct is not worthy of removal. Accordingly, given the serious nature of the underlying charges, and that the fact that at the time of the incident, the appellant had been employed less than two years, the Commission finds that the penalty of removal is appropriate.

ORDER

The Civil Service Commission finds that the appointing authority's action in removing the appellant was justified. Therefore, the Commission affirms that action and dismisses the appeal of Nicolas Castillo.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.